RHB Bank Bhd v YB Menteri Sumber Manusia Malaysia & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-197–06 OF 2015
HAMID SULTAN, VARGHESE GEORGE AND ZAMANI A RAHIM JJCA
6 JULY 2017

Labour Law — Trade union — Recognition — Recognition to represent executives in management or executive capacity — Whether trade union could be accorded recognition to represent two separate and distinct categories of staff — Whether trade union could purport to represent a category of staff who did not participate nor vote in secret ballot process provided under the Act — Industrial Relations Act 1967 s 9

This was an appeal against the decision of the High Court judge which dismissed the appellants' application for judicial review. The second respondent was a trade union who had applied for registration as an in-house trade union. The first respondent had approved the second respondents' application and subsequently the second respondent was registered as a trade union. The second respondent submitted a claim for recognition to the appellant under s 9 of the Industrial Relations Act 1967 ('the Act'). The second respondent sought recognition to represent executives from Category E1 to E4. However, the appellant informed the second respondent it was unable to record recognition as it was alleged the second respondent could only represent executives who were either in the management or executive capacity but not both and the second respondent had not shown to the appellant that it represented the majority of executives/senior executives of Grades 1 and 2. The Director General of Industrial Relations ('the DGIR') requested the appellant to submit the list of executives from Grades 1 to 4 except those employed in management, confidential and security. The same was forwarded by the appellant by a letter dated 9 March 2012 to the DGIR in the List of Executives (Lampiran A) from Grades 1 to 4. A secret ballot was held and the second respondent had secured 53.04% votes pursuant to s 9(5) of the Act. The DGIR informed the appellant that the minister had directed the appellant to accord recognition to the second respondent. The appellant later filed a judicial review to challenge and quash the decision of the first respondent. The learned High Court judge dismissed the applicants' application for judicial review. The issues for consideration as submitted by the appellant were: (a) whether a trade union could be accorded recognition under s 9 of the Act to represent two separate and distinct categories of staff; and (b) whether a trade union, by reason of such order of recognition could purport to represent a category of staff who did not

participate nor vote in the secret ballot process provided for under the Act. A

Held, dismissing the appeal with costs of RM10,000 to be paid to the second respondent subject to allocator:

(1) The issues appeared to be valid questions of law, however such questions were an abuse of process when they were not put before the administrative decision was taken and more so when the appellant had all the opportunity to deal with the provisions of law and object to it at the earliest opportunity (see para 12). B

(2) The court agreed with the High Court judge's finding that the appellant had contradicted the list of names submitted by the appellant themselves to the second respondent and the DGIR vide its letter dated 9 March 2012. The documents submitted clearly referred to executive officers from Grades E1 to E4. The appellant could not deny its own action to prevent the second respondent from being recognised (see para 12). C D

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan hakim Mahkamah Tinggi yang mana menolak permohonan perayu-perayu untuk semakan kehakiman. Responden kedua adalah kesatuan sekerja yang memohon bagi pendaftaran sebagai kesatuan sekerja dalaman. Responden pertama telah meluluskan permohonan responden kedua dan kemudiannya responden kedua didaftarkan sebagai kesatuan sekerja. Responden kedua memasukkan tuntutan bagi pengiktirafan kepada perayu di bawah s 9 Akta Perhubungan Perusahaan 1967 ('Akta'). Responden kedua memohon pengiktirafan untuk mewakili eksekutif daripada Kategori E1 hingga E4. Walau bagaimanapun, perayu memberitahu responden kedua ia tidak dapat merekod pengiktirafan kerana ia didakwa bahawa responden kedua hanya dapat mewakili eksekutif yang sama ada di dalam kapasiti pengurusan atau eksekutif tetapi bukan kedua-duanya dan responden kedua tidak menunjukkan kepada perayu yang ia mewakili majoriti eksekutif/eksekutif kanan Gred 1 dan 2. Ketua Pengarah Perhubungan Perusahaan ('KPPP') meminta perayu menyerahkan senarai eksekutif Gred 1 hinggga 4 kecuali mereka yang berada dalam pengurusan, rahsia dan sekuriti. Itu juga dihantar kepada perayu melalui surat bertarikh 9 Mac 2012 kepada KPPP dalam Senarai Eksekutif-Eksekutif (Lampiran A) daripada Gred 1 hingga 4. Pengundian rahsia diadakan dan responden kedua telah mendapat undian sebanyak 53.04% berikutan s 9(5) Akta. KPPP memberitahu perayu bahawa Menteri telah mengarahkan perayu untuk memberi pengiktirafan kepada responden kedua. Perayu kemudiannya memfailkan semakan kehakiman untuk menentang dan membatalkan keputusan responden pertama. Hakim Mahkamah Tinggi yang bijaksana menolak permohonan pemohon-pemohon untuk semakan kehakiman. Isu-isu untuk pertimbangan seperti yang dihujahkan oleh perayu adalah: (a) sama ada kesatuan sekerja boleh diberikan pengiktirafan di bawah s 9 Akta untuk mewakili dua kategori E F G H I

berasingan dan berbeza pekerja; (b) sama ada kesatuan sekerja, atas alasan peritah pengiktirafan sedemikian boleh mewakili kategori pekerja yang tidak mengambil bahagian ataupun mengundi dalam proses pengundian rahsia yang diperuntkkan di bawah Akta.

Diputuskan, menolak rayuan dengan kos sebanyak RM10,000 untuk dibayar kepada responden kedua tertakluk kepada alukator:

(1) Isu-isu adalah seperti soalan undang-undang yang sah, walau bagaimanapun soalan-soalan tersebut adalah penyalahgunaan proses apabila ia tidak dimasukkan sebelum keputusan pentadbiran diambil dan lebih lagi apabila perayu telah mempunyai keseluruhan peluang untuk menguruskan dengan peruntukan undang-undang dan membantah terhadapnya pada peluang yang paling awal (lihat perenggan 12).

(2) Mahkamah bersetuju dengan dapatan hakim Mahkamah Tinggi bahawa perayu telah bercanggah dengan senarai nama yang diserahkan oleh perayu sendiri kepada responden kedua dan KPPP melalui suratnya bertarikh 9 Mac 2012. Dokumen-dokumen yang dimasukkan jelas merujuk kepada pegawai-pegawai eksekutif daripada Gred E1 hingga E4. Perayu tidak dapat menafikan tindakannya sendiri untuk menghalang responden kedua daripada diiktirafkan (lihat perenggan 12).]

Notes

For cases on recognition, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2107–2138.

Cases referred to

Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] 1 AC 374, HL (refd)

Menteri Kewangan & Anor v Wincor Nixdorf (M) Sdn Bhd and another appeal [2016] 4 MLJ 621; [2016] 6 CLJ 215, CA (refd)

Minister of Human Resources, Malaysia v Diamet Klang (Malaysia) Sdn Bhd & Another Appeal [2015] 6 CLJ 181, CA (refd)

National Union of Bank Employees v Director General of Trade Unions & Anor [2015] 1 MLJ 881, CA (refd)

R Rama Chandran v Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1, FC (refd)

Legislation referred to

Industrial Relations Act 1967 s 9, 9(1)
Trade Unions Act 1959

Appeal from: Application For Judicial Review No 25–14–02 of 2014 (High Court, Kuala Lumpur)

Romesh Abraham (David Ng with him) (Shook Lin & Bok) for the appellant.
Rozielawaty Ab Ghani (Raihana Maimunah bt Rushdi with her) (Senior Federal Counsel, Attorney General's Chambers) for the first respondent.
Azmer bin Md Saad (Lainah Yaacob & Zulkepli) for the second respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant appeals against the decision of the learned High Court judge who refused to quash the decision of the Minister giving recognition to the second respondent, the Trade Union, pursuant to s 9 of the Industrial Relations Act 1967 ('the IRA 1967') on the grounds that the appellant had consented to a procedure relating to ballot by the employees concerned whom the appellant had approved. In essence, the learned trial judge took the position that the decision arising from the ballot procedure as well as the decision of the Minister ought not be impinged by entertaining the complaint by the appellant that those who balloted did not satisfy the requirement stated in the Act.

[2] This appeal came before us for hearing on 17 August 2016. We heard the appeal and dismissed it. In this case the learned High Court judge had written an articulate judgment on the facts and law and in consequence a further judgment is sheer waste of judicial time. It has been a long practice of the Court of Appeal to only write a judgment if the appeal is allowed in cases related to the original jurisdiction of the High Court and that too when an application for leave to appeal to the Federal Court is notified by the registry to the coram. In matters where the appeal is dismissed, a judgment will not be provided unless leave to appeal has been obtained from the Federal Court to appeal. That is to say, if the appeal is dismissed by the Court of Appeal, leave need to be obtained from the Federal Court for the Court of Appeal to give its grounds of judgment. If the appeal is from subordinate court whether the appeal is allowed or dismissed, the Court of Appeal will not write a judgment unless the coram decides otherwise. This practice is not without reason as it will be impossible with the present strength of the appellate court to write judgment for all appeals which are dismissed or in case where the appeal is allowed and no party is appealing on that. In addition, the lack of a judgment from the Court of Appeal will not prejudice the appellant to obtain leave in relevant appeals as there is already an existing judgment of the High Court to support the leave application.

[3] In the instant case, I have been informed by the registry that the Federal Court has given leave for the following question, namely:

Whether a trade union, by reason of an order of recognition, made under Section 9 of the Act, may purport to represent a category of staff who did not participate nor vote in the secret ballot process provided for under the Act.

[4] I am now constrained to write the judgment, whilst my two brother judges had retired upon reaching the constitutional age. That is to say, this judgment has not been read and approved by them, though we had agreed that the learned trial judge was correct in law in all aspects.

[5] The amended memorandum of appeal reads as follows:

(1) The learned Judge erred in law in failing to hold that the 1st Respondent's decision to accord recognition to the 2nd Respondent was contrary to the provisions of Section 9(1) of the Industrial Relations Act 1967 ('the Act') and thereby in excess of jurisdiction.

(2) The learned Judge erred in law in failing to hold the 1st Respondent's decision to accord recognition was in excess of jurisdiction in that Section 9(1) of the Act only entitles a union to represent either workmen in a managerial capacity or in an executive capacity and not in both capacities.

(3) The learned Judge erred in law in failing to hold that the 1st Respondent's decision to accord recognition was in excess of jurisdiction in that it sought to include both executives/senior executives (in Grades 1 and 2) and also managers/senior managers (in Grades 3 and 4) of the Appellant.

(4) The learned Judge erred in law in failing to hold that that the 1st Respondent's decision to accord recognition was in excess of jurisdiction in that the 2nd Respondent did not have the requisite locus standi to represent managers and senior managers holding Grades 3 and 4 in the Appellant.

(5) The learned Judge erred in law in failing to hold that that the 1st Respondent's decision to accord recognition was in excess of jurisdiction in that the 1st Respondent failed to take into account the following material facts:

(a) that managers and senior managers in Grades 3 and 4 are, by their position and functions, in charge of and supervise executives in Grades 1 and 2; and

(b) that managers and senior managers in Grades 3 and 4 are part of the management team who would decide on the Key Performance Index, measurement of work standards and remuneration of executives in Grades 1 and 2.

(6) The learned Judge erred in law in failing to hold that that the 1st Respondent's decision to accord recognition was in excess of jurisdiction in purporting to rely on a list of 'Eksekutif dari Gred 1 hingga 4' when, in

fact, such list specifically drew a distinction between executives in Grades 1 and 2 and those in Grades 3 and 4.

(7) The learned Judge erred in law in failing to hold that that the 1st Respondent's decision to accord recognition was in excess of jurisdiction in that the 1st Respondent had failed to take into account the Letter of Agreement executed by the Appellant and 2nd Respondent and witnessed by the Director-General of Industrial Relations that a secret ballot would be conducted in respect of the 1,800 executives from Grades 1 and 2 only.

(8) The learned Judge erred in law in failing to hold that the 1st Respondent's decision to accord recognition was in excess of jurisdiction in that the 1st Respondent failed to take into account the list as seen in 'Lampiran AT (which is annexed to the Letter of Agreement) only includes executives in Grades 1 and 2 despite inadvertently titled as 'Eksekutif dari Gred 1 hingga 4 (kecuali mereka di dalam jawatan pengurusan, sulit atau keselamatan'.

(9) The learned Judge erred in law in failing to hold that that the 1st Respondent's decision to accord recognition was in excess of jurisdiction in that the decision was based upon a secret ballot in which 1,800 executives in Grades 1 and 2 participated in and voted on and hence, would only be applicable to such staff.

(10) The learned Judge erred in law in failing to hold that the 1st Respondent's decision to accord recognition was in excess of jurisdiction in that it purported to include managers and senior managers in Grades 3 and 4 who had neither participated nor voted in the said secret ballot and were, therefore, not bound by the result of the said secret ballot in any manner.

(11) The learned Judge erred in law in failing to hold that that the 1st Respondent s decision to accord recognition was, in all the circumstances, manifestly unreasonable, irrational in law and in excess of the 1st Respondent's powers under Section 9(5) of the Act.

(12) The learned Judge erred in law in failing to hold that the 1st Respondent's decision to accord recognition was in excess of jurisdiction in that the said decision failed to take into account the following material facts:

(a) That the Applicant, by letter dated 6.1.2012 to the Director General of Trade Unions, set out the separate and distinct roles and responsibilities of executives and senior executives in Grades 1 and 2 in contrast to the roles and responsibilities of managers and senior managers in Grades 3 and 4.

(b) That the Applicant, by letter dated 9.3.2012 to the Director-General of Industrial Relations in the enclosed List submitted (Lampiran A) drew a distinction between employees who were in the managerial, confidential and security categories and those who were not.

(c) That Lampiran A1, annexed to the Letter of Agreement, specifically

included only executives and senior executives in Grades 1 and 2 (totaling 1.800 employees).

(d) That managers and senior managers in Grades 3 and 4 were set out in a separate list (totalling 1.820 employees) and which list did not form part of the said Lampiran A1.

(13) The learned Judge erred in law in failing to hold that the 1st Respondent's decision to acccord recognition was based on the following incorrect and/or erroneous basis:

(a) That the title of the document Lampiran A1 could, in itself, be utilized to determine which employees would be entitled to participate in the secret ballot without reference to the relevant legal provisions under Section 9 of the Act.

(b) That the title to the document Lampiran A1 could, in itself, be utilized to determine which employees would be entitled to participate in the secret ballot without reference to the contents of the said document.

PRELIMINARIES

[6] In the instant case, the second respondent has been successfully registered as a Trade Union pursuant to the Trade Unions Act 1959 ('the TUA 1959). Registration per se means nothing until recognition is obtained pursuant to s 9 of the IRA 1967 (see *National Union of Bank Employees v Director General of Trade Unions & Anor* [2015] 1 MLJ 881). At the recognition stage, the views of the employer must be taken into account. Section 9 sets out a statutory procedure to obtain the views of the employer. Section 9 states:

9(1) No trade union of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities that is to say —

(a) managerial capacity;

(b) executive capacity;

(c) confidential capacity; or

(d) security capacity,

may seek recognition or serve an invitation under section 13 in respect of workmen employed in any of the abovementioned capacities.

(1A) Any dispute arising at any time, whether before or after recognition has been accorded, as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity may be referred to the Director General by a trade union of workmen or by an employer or by a trade union of employers.

(1B) The Director General, upon receipt of a reference under subsection (1a), may take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter.

(1C) Where the matter is not resolved under subsection (1B) the Director General shall notify the Minister.

(1D) Upon receipt of the notification under subsection (1C), the Minister shall give his decision as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity and communicate in writing the decision to the trade union of workmen, to the employer and to the trade union of employers concerned.

(2) Subject to subsection (1), a trade union of workmen may serve on an employer or on a trade union of employers in writing in the prescribed form a claim for recognition in respect of the workmen or any class of workmen employed by such employer or by the members of such trade union of employers.

(3) An employer or a trade union of employers upon whom a claim for recognition has been served shall, within twenty-one days after the service of the claim —

(a) accord recognition; or

(b) if recognition is not accorded, notify the trade union of workmen concerned in writing the grounds for not according recognition.

(c) *(Deleted by Act A1322).*

(3A) Upon according recognition to the trade union of workmen concerned under paragraph (3)(a), the employer or the trade union of employers concerned shall notify the Director General.

(4) Where the trade union of workmen concerned receives a notification under paragraph (3)(b), or where the employer or trade union of employers concerned fails to comply with subsection (3), the trade union of workmen may, within fourteen days —

(a) of the receipt of the notification; or

(b) after the twenty-one day period in subsection (3) has lapsed,

report the matter in writing to the Director General, failing which the claim for recognition shall be deemed to have been withdrawn.

(4A) Upon receipt of a report under subsection (4), the Director General may take such steps or make such enquiries to ascertain —

(a) the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom the recognition is sought to be accorded; and

(b) by way of secret ballot, the percentage of the workmen or class of

workmen, in respect of whom recognition is being sought, who are members of the trade union of workmen making the claim.

(4B) For the purpose of carrying out his functions under subsection (1B) or (4A) the Director General —

(a) shall have the power to require the trade union of workmen, the employer, or the trade union of employers concerned to furnish such information as he may consider necessary or relevant within the period specified in the requirement;

(b) may refer to the Director General of Trade Unions for him to ascertain the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded, and the performance of duties and functions by the Director General of Trade Unions under this paragraph shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions; and

(c) may enter any place of employment where any workmen in respect of whom a claim for recognition is sought to be accorded are being employed to examine any records or documents or to conduct secret ballot.

(4C) Upon ascertaining the matter under subsection (4A), the Director General shall notify the Minister.

(5) Upon receipt of a notification under subsection (4C) the Minister shall give his decision thereon; where the Minister decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer or trade union of employers concerned, as the case may be, as from such date as the Minister may specify.

(6) A decision of the Minister under subsection (1D) or (5) shall be final and shall not be questioned in any court.

[7] In the instant case, the views and also who are the persons who should vote, was agreed upon by the employer. The balloting process was done and 53.04% voted in favour of the second respondent. In consequence, the Director General of Industrial Relations ('DGIR') and/or Minister had accepted the balloting process and the decision and had directed recognition be given to the second respondent. That decision the appellant had challenged by way of judicial review in the High Court, purportedly for a breach under s 9(1) which in jurisprudential terms and development of case laws on the facts of the instant case is not maintainable in a judicial review application related to executive decision.

[8] What is essential to note is s 9 deals with a discretionary exercise of administrative decision. In simple terms, there was no objection by the

appellant in relation to s 9(1) of the IRA. It is incumbent that any relevant objection must be made before the decision making process itself. Piecemeal objection based on law will not be entertained in law when the administrative authority has followed the procedure laid down in the law and due opportunity for objection had been given and no objection on the particular ground had been raised before the decision making process. Basically, administrative law does not entertain second bites at the cherry when a statutory procedure is in place and rightly acted upon.

[9] As a general rule, judicial review relating to executive and/or administrative decision is restricted to the decision making process. It has nothing to do with the merits, substance or justification of the decision in question. There are exceptions. Further, the jurisprudence may differ if it is a decision of a tribunal (see *Menteri Kewangan & Anor v Wincor Nixdorf (M) Sdn Bhd and another appeal* [2016] 4 MLJ 621; [2016] 6 CLJ 215). If s 9(1) objection has been taken from beginning, then the High Court would be obliged to give weight when the decision is challenged. The distinction is like differences between an apple and orange.

BRIEF FACTS

[10] The central complaint of the appellant as captured by the learned High Court judge read as follows:

> 6.2. The first respondent had acted without jurisdiction and/or had exceeded his jurisdiction and/or had erred in law and fact as the first respondent had failed to take into account pursuant to s 9(1) of the IRA 1967, a trade union can only represent the officers in the executive capacity but not both the executives and the management capacities who at all material times are within grades 3 and 4 respectively, whereas grades 1 and 2 are officers who are in the executive and senior executive capacities.

[11] The facts of the case have been set out by the respondent. To save judicial time, I repeat verbatim and, inter alia, it read as follows:

> 2. The second respondent had made an application on 8 July 2010 for registration as an in-house trade union pursuant to s 10(1) of the Trade Unions Act 1959 to the Department of Trade Union Affairs to represent executives under categories of Grade E1 – Grade E4.
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> 3. The first respondent had approved the said application and pursuant to the said approval, the second respondent was registered as a trade union on 27 December 2010 under s 12(1) of the Trade Unions Act 1959 .
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> 4. Pursuant to s 13 of the Trade Unions Act 1959 the first respondent had issued to the second respondent a certificate of registration (Form D). As at 31 December 2013 the second respondent represent 1900 of its members from Grade E1 to Grade E4.

5. On 9.3.2011, the 2nd Respondent submitted to the Appellant a claim for recognition under section 9 of the Industrial Relations Act 1967. The class of workmen in respect of whom the 2nd Respondent sought recognition to represent was Executives Category E1 to Category E4.

6. However vide a letter dated 30.3.2011, the Appellant had informed the 2nd Respondent that it was unable to accord recognition on the following grounds:

(a) The 2nd Respondent sought to represent executives who are in Grade 1 to Grade 4 and alleged that the 2nd Respondent could only represent executives who are either in the Management or Executive capacity but not both capacities; and

(b) The 2nd Respondent had not shown to the Appellant that it represented the majority of the Executives/Senior Executives of Grades 1 and 2.

7. As a result of the above, the Director General of Industrial Relations (DGIR) had by a letter dated 5.5.2011 requested from the Appellant to confirm receiving Form A and all the relevant documents from the 2nd Respondent to which the Appellant had by letter dated 16.5.2011 confirmed receiving the claim for recognition from the 2nd Respondent.

8. By a letter dated 30 December 2011 the Director General of Industrial Relations had informed the Appellant that the claim of recognition by the 2nd Respondent had been referred to the Director General of Industrial Relations pursuant to section 9 (4B)(b) of the Industrial Relations Act 1967 to ascertain the competency of the 2nd Respondent to represent the employees of the Appellant.

9. By a letter dated 10.2.2012 the Director General of Industrial Relations had requested the Appellant to submit the List of Executives from Grade 1 to Grade 4 except those employed in management, confidential and security capacities.

10. By a letter dated 9.3.2012 the Appellant had responded to the request and forwarded to the Director General of Industrial Relations the a List of Executives (Lampiran A) from Category Grade 1 to Grade 4.

11. Vide the letter dated 5.9.2013, the Director General of Industrial Relations informed the Appellant that a meeting will be held on 10.10.2013 to discuss the process of secret balloting and to determine the percentage of the 2nd Respondent's members.

12. The meeting was held on 10.10.2013 and an agreement was reached by the Appellant and the 2nd Respondent and thereupon executed the Letter of Agreement.

13. The secret balloting process were held on 9.11.2013 at Kajang branch, 16.11.2013 at Johor Bharu branch, 23.11.2013 at Sungai Petani branch and 30.11.2013 at Kuantan Branch.

14. It was also agreed by the Appellant and the 2nd Respondent that all the executives in the List of Executives (Lampiran A1) consisting of 1800 executives were entitle to vote.

Semua pekerja-pekerja syarikat yang terdapat dalam Lampiran A1 bertarikh 10.10.2013 berjumlah 1800 adalah berhak mengundi.

15. On 9.11.2013 the secret balloting had been exercised and as on 16.11.2013 the 2nd Respondent had secured majority votes, it has been agreed that the secret balloting scheduled on 23.11.2013 and 30.11.2013 will be called off.

16. As the 2nd Respondent had secured 53.04% votes held on 9.11.2013, pursuant to section 9(5) of the Industrial Relations Act 1967 the DGIR had vide letter dated 12 December 2013 informed the Appellant that the Minister had directed RHB to accord recognition to the 2nd Respondent involving all employees of the Appellant in the Executive category Grade 1 to Grade 4 except those employees who are employed in the management, confidential and security capacities with effect from 9.3.2011.

17. The Appellant then filed the application for judicial review to challenge and quash the decision of the 1st Respondent directing the Appellant to accord recognition to the 2nd Respondent involving all employees of the Appellant in the Executive category Grade 1 to Grade 4 except those employees who are employed in the management, confidential and security capacities with effect from 9.3.2011

18. Upon hearing the submissions by both parties on 23.8.2011 the learned High Court Judge had dismissed the Applicant's application for judicial review.'

[12] I had read the appeal record and the submission of the learned counsel. After giving much consideration to the submission of the learned counsel for the appellant, we took the view that the appeal must be dismissed. My reasons, inter alia, are as follows:

(a) before us, the learned counsel for the appellant with great ingenuity had framed the question for consideration by us in the executive summary as follows:

> (a) Can a trade union be accorded recognition under the provisions of Section 9 of the Industrial Relations Act, 1967 ('the Act') to represent two separate and distinct categories of staff ie to represent both executives and managerial staff; and
>
> (b) Can a trade union, by reason of such order of recognition, purport to represent a category of staff who did not participate nor vote in the secret ballot process provided for under the Act.

(b) the questions posed may appear to be valid questions of law but such questions must be seen to be an abuse of process when these questions were not put before the administrative decision was taken and more so when the appellant had all the opportunity to deal with the provisions of law and object to it at the earliest opportunity. Support for the proposition is found in a number of cases, to name a few are as follows:

(i) the traditional view in respect of judicial review, in respect of executive decision which is still good law in the Malaysian context was expounded in the case of *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] 1 AC 374. That case anchors the point to say judicial review is not an appeal from a decision, but

a review of the manner in which the decision was made. In doing so, the court are obliged to consider the jurisprudence related to illegality, irrationality and procedural impropriety and when it relates to sentence or deprivation thereof of the subject then the proportionality principle need to be taken into consideration (see *Menteri Kewangan & Anor v Wincor Nixdorf (M) Sdn Bhd and another appeal* [2016] 4 MLJ 621; [2016] 6 CLJ 215). However, when judicial review is related to a tribunal decision, Malaysian courts have expanded the scope to say that the courts are permitted to scrutinize the decision not only for the process but also for substance (see *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 and *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1);

(ii) when it relates to recognition under s 9 of the IRA, the court has been firm to adhere to the strict jurisprudence advocated in the *Civil Service Union*'s case. That is to say, for the purpose of the instant case, whatever information needed to be furnished, it ought to have been furnished by the relevant parties when the opportunity was given so and very importantly in the instant case by the appellant. Subsequent complaint to the court to accuse the DGIR or the Minister for not taking into consideration the relevant facts according to law will not be entertained. On somewhat similar facts, the Court of Appeal in the case of *Minister of Human Resources, Malaysia v Diamet Klang (Malaysia) Sdn Bhd & Another Appeal* [2015] 6 CLJ 181, in dealing with s 9 of the IRA had this to say:

> From our reading of s 9 of the Industrial Relations Act 1967, we are of the view that the scheme of things under the said section is that if an employer is served with a notice of recognition and the employer notifies the Union that it refuses recognition, the Union may report the matter in writing to the DGIR (s 9(3) and 9(4) of the Act). Upon receiving the report, the DGIR may carry out enquiries to ascertain the competency of the Union to represent the employees and the percentage of employees who want to be represented. The DGIR may resort to secret ballot in order to ascertain this fact. The DGIR may conduct the enquiries himself or he may refer it to the Director General of Trade Union (DGTU) to do it — (s 9(4A) and 9(4B) of the Act). Upon completion of the enquiries and if the matter cannot be resolved by the DGIR/DGTU, the latter shall notify the, Minister and upon receipt of such notification the Minister shall give his decision thereon — (s 9(4C) and 9(5) of the Act). Under the scheme of things therefore the Minister may rely on the report by the DGTU/DGIR as to the competency issue and made his decision thereon. We think there is nothing fanciful or unreasonable for the Minister to do so. In fact we do not think the Act envisages that the Minister himself goes to the ground

> to conduct the enquiries in order to ascertain the truth of the facts contained in the report that was notified to him by the DGTU/DGIR ... In our view the learned High Court judge should, in the circumstances and facts of the case give effect to s 9(6) of the Act as to the conclusiveness and finality of the Ministerial decision on competency. The provision was inserted so as to provide some stability in the labour management and organisation in this country. Therefore the courts should be slow to find fault with the Minister's decision in exercising his discretion to accord recognition to a Union of workers. (Emphasis added.)

And at p 226, the Court of Appeal observed:

> [17] It is obvious from the reading of the averments in the Minister's affidavit that the Minister had given consideration to the fact that there was secret ballot taken after discussions between the interested parties to determine the wishes of the company's employees to be represented by the Union and the fact that the discussion prior to the secret balloting was attended by representatives of the Union and the company. The Minister also had given consideration to the report by DGTU/DGIR and all the relevant information and facts contained in the report. We do not see any wrong in the act of the Minister to rely on the report by the DGTU/DGIR in arriving at his decision to accord recognition to the Union as long as the Minister had applied his mind independently as to the contents of the report. The learned judge had not offered any reason why the Minister cannot rely on the report by the DGTU/DGIR. The learned judge also has not made any finding that the Minister had mechanically applied and adopted the recommendation of the DGTU/DGIR as contained in the report.

(iii) we agreed with the learned High Court judge's findings that, in respect of question (a), the appellant had contradicted the list of names submitted by the appellant itself to the second respondent and the DGIR vide its letter dated 9 March 2012. The documents submitted for the purpose of the secret balloting had clearly referred to the officers in the executive category from Grade E1 to Grade E4. The appellant could not now deny its own action to deny the second respondent its recognition.

[13] For reasons stated above, we took the view that the appeal has no merits. In consequence, the appeal was dismissed with costs of RM10,000 to be paid by the appellant to the second respondent, subject to allocatur. Deposit was to be refunded.

We hereby ordered so.

Appeal dismissed with costs of RM10,000 to be paid to the second respondent subject to allocator.

Reported by Fatin Mohd Ismail